A

**DR ST SINGAM**

**v.**

**LEE SIEW LEONG**

B

COURT OF APPEAL, PUTRAJAYA
SITI NORMA YAAKOB JCA
AHMAD FAIRUZ JCA
DENIS ONG JCA
C [CIVIL APPEAL NO: B-02-410-96]
28 SEPTEMBER 2006

***LANDLORD AND TENANT:*** *Recovery of possession - Notice to quit - Tenant disregarded notice and continued staying on demised premises - Unrecorded payments made by tenant to landlord - Whether for renewal of tenancy - Whether tenant exercised option to purchase*

D

The respondent ('landlord') was the owner of a three-storey shop house with a penthouse ('demised premises') which he had let to the appellant ('tenant') under a memorandum of understanding. E The memorandum of understanding was subsequently superseded by a formal tenancy agreement executed by the parties concerned. The tenant who was a dentist occupied the first floor of the demised premises which he had turned into a dental clinic and surgery and sub-let the other floors and the penthouse. F Relationship between the parties turned sour soon after the tenant moved into the demised premises. A second agreement was executed to replace the first agreement that was to expire on 28 February 1987. In the interim period, the tenant made two unrecorded payments of RM48,000 and RM38,000. Upon expiry G of the second agreement, the landlord issued the tenant with a notice to quit. The tenant disregarded the notice and continued staying on the demised premises on the ground that the tenancy had been renewed for a further period of three years until 28 February 1990 upon the landlord's acceptance of the payment of H RM38,000. He also withheld paying any rental since March 1987. The landlord then filed an application in the court for, *inter alia*, vacant possession of the demised premises and mense profits. The tenant counterclaimed that a receipt ('D9') documenting payment of RM38,000 showed a binding agreement entitling him for I specific performance. The trial judge, however, dismissed the tenant's counterclaim and allowed the landlord's claim. Hence, the tenant's appeal.

It was the tenant's case that the first unrecorded payment of RM48,000 to the landlord was a commission or inducement to obtain the tenancy of the whole building and the closing of the air-well, so that he, the tenant would acquire a bigger space with which he could sub-let for better rents. Also, the payment of RM38,000 was a tacit oral arrangement reached between him and the landlord that the tenancy was allowed to run for a further period of three years with an option to purchase the demised premises at the agreed price of RM500,000 which he had already exercised by tendering 10% of the purchase price to the landlord. That oral arrangement had since been documented in D9. The landlord rebutted by explaining that the payment of RM38,000 was to tide over the costs of covering the air-well and other renovations to be done to the demised premises. He never intended to renew the tenancy beyond 28 February 1987. Hence, the notice to quit issued to the tenant. Likewise he never intended to sell the demised premises and had returned the 10% deposit as he had never granted the tenant the option to purchase. The particulars in relation to the payment of RM38,000 were added into D9 well after it was issued without his consent or knowledge. Hence, D9 was a forgery and the tenant could not rely on it to support his counterclaim.

**Held (dismissing the appeal)**
**Per Siti Norma Yaakob JCA delivering the judgment of the court:**

**(1)** There was no reason to doubt the purpose of the payment of RM48,000 to the landlord. The landlord never questioned such a purpose in the first place as he had taken the stand that he had never received such a payment at all, a stand that was disbelieved by the trial judge on the evidence adduced and which this court endorsed to have been correctly determined. Further, the trial judge after finding that the RM48,000 was an undercover payment, did not proceed further to consider the legal implications of the tenant's conduct in tendering the money and the respondent's conduct in accepting it. There is a growing body of authority that such a payment allows the existence of a collateral agreement to exist side by side with the main agreement that it supplements or contradicts. If indeed, there existed an oral agreement between the parties, the payment would be an inducement to obtain the tenancy of the whole building and the closing up

of the air-well so that the tenant would acquire a bigger space with which he could sub-let for better rents. The tenant succeeded in securing the first term of the oral agreement as the whole building was leased to him. However, whilst it was true that the landlord breached the second term of the oral agreement by not covering the air-well, he could not be faulted for it. This was because he was unable to get the approval of the relevant authorities to effect such renovations. Further, despite that failure, he did attempt to renovate the demised premises at the insistence of the tenant but was forced to stop such works following complaints from the sub-tenants. In the circumstances, no blame should be attached to the landlord and he could not be said to have breached any of the terms of the oral agreement. (paras 24, 30, 31, 32, 33, 34 & 35)

**(2)** A party who has the custody of an instrument, document or deed made for his benefit is bound to preserve it in its original state and any material alteration of it will vitiate the instrument, if it is done without the consent of the other party. The unilateral alteration of D9 was sufficient to enable the landlord to treat D9 as being non-binding on him. Added to this was the contradictory statements made by the tenant as to what the payment of RM38,000 stood for. The tenant relied on D9 to support his counterclaim, the very same instrument on which he had unashamedly admitted he had added words without the knowledge and consent of the landlord and which was proved to contain false information. For that very reason, there was no reason to interfere with the trial judge's finding that D9 was forged by the tenant and therefore could not be relied upon as the foundation of his counterclaim. (para 40, 41, 42 & 48)

***Bahasa Malaysia*** *translation of headnotes*

Responden ('tuantanah') adalah pemilik sebuah bangunan kedai tiga tingkat dengan sebuah penthouse di atasnya ('harta demis') yang disewakan kepada perayu ('penyewa') di bawah satu memorandum persefahaman. Memorandum persefahaman kemudian diganti dengan satu perjanjian tenansi yang formal oleh pihak-pihak. Penyewa, seorang doktor gigi, menghuni tingkat satu harta demis dan telah menukarkan tingkat tersebut kepada sebuah klinik pergigian dan pembedahan, sementara tingkat-tingkat lain termasuk penthouse telah disewakan oleh beliau kepada lain-lain penyewa.

Hubungan antara pihak-pihak bertukar dingin sebaik penyewa menduduki harta demis. Berikutnya, perjanjian kedua telah dibuat bagi menggantikan perjanjian pertama dan akan tamat pada 28 Februari 1987. Sementara itu, penyewa membuat dua bayaran yang tidak direkodkan berjumlah RM48,000 dan RM38,000. Apabila perjanjian kedua tamat, tuantanah mengeluarkan notis keluar kepada penyewa. Penyewa tidak memperdulikan notis, dan terus menduduki harta demis atas alasan bahawa, sewaktu tuantanah menerima pembayaran RM38,000 di atas, tenansi telah diperbaharui untuk tempoh tiga tahun lagi dan akan tamat pada 28 Februari 1990. Beliau juga enggan membayar sewa sejak Mac 1987. Berikutnya, tuantanah memfail permohonan di mahkamah memohon, antara lain, milikan kosong harta demis dan mense profits. Penyewa menuntut balas bahawa pembayaran RM38,000 telah didokumentasikan melalui resit ('D9') dan dengan itu terdapat perjanjian mengikat yang menjadikan beliau berhak kepada pelaksanaan spesifik. Hakim bicara bagaimanapun telah menolak tuntutan balas penyewa dan membenarkan tuntutan tuantanah. Penyewa dengan itu merayu.

Adalah menjadi kes penyewa bahawa bayaran tidak direkodkan pertama berjumlah RM48,000 kepada tuantanah adalah komisyen atau pendorong untuk mendapatkan tenansi bagi keseluruhan bangunan dan bagi menutup ruang udara, supaya, dengan itu, beliau akan mendapat ruang yang lebih besar untuk disewa dan mendapat pulangan sewa yang lebih tinggi. Selain itu, pembayaran RM38,000 melibatkan perjanjian lisan yang dibuat secara diam-diam dengan tuantanah bahawa tenansi boleh diteruskan untuk tempoh tiga tahun lagi dengan opsyen untuk membelinya pada harga RM500,000, opsyen mana, telah dilaksanakan beliau dengan membayar 10% harga bangunan kepada tuantanah. Menurut penyewa, perjanjian lisan tersebut juga telah didokumentasikan melalui D9. Tuan tanah menyangkal dan mengatakan bahawa bayaran RM38,000 adalah untuk menanggung kos menutup ruang udara dan renovasi lain yang perlu dibuat di harta demis, dan bahawa beliau tidak berhasrat untuk melanjutkan tenansi melampaui tarikh 28 Februari 1987. Menurut tuantanah, itulah sebabnya mengapa beliau mengeluarkan notis untuk keluar. Juga, beliau tidak berhasrat untuk menjual harta demis dan telah memulangkan deposit 10% kerana beliau tidak pernah memberi opsyen yang dikatakan itu. Dihujah selanjutnya bahawa butiran berhubung pembayaran RM38,000 telah ditokok ke dalam D9

A lama selepas ianya dikeluarkan tanpa pengetahuan atau kebenaran beliau. Maka D9 adalah satu pemalsuan dan penyewa tidak boleh bergantung kepadanya bagi menyokong tuntutan balas.

**Diputuskan (menolak rayuan)**

B **Oleh Siti Norma Yaakob HMR menyampaikan penghakiman mahkamah:**

**(1)** Tiada alasan untuk meragui alasan mengapa RM48,000 dibayar kepada tuantanah. Pertama, alasan tersebut tidak pernah dipersoal oleh tuantanah kerana beliau mengambil pendirian bahawa beliau langsung tidak menerima wang itu, pendirian mana tidak dipercayai oleh hakim bicara berdasarkan keterangan yang ada. Mahkamah ini bersetuju bahawa keputusan yang demikian itu adalah betul. Selain itu, hakim bicara, setelah mendapati RM48,000 tersebut sebagai bayaran bawah kaunter, tidak membuat perbincangan lanjut mengenai implikasi undang-undang terhadap perbuatan penyewa dalam membuat pembayaran serta tindakan tuantanah dalam menerima pembayaran tersebut. Terdapat semakin banyak autoriti yang menyatakan bahawa pembayaran sedemikian menjurus kepada wujudnya perjanjian sampingan yang wujud selari dengan perjanjian utama dan boleh menyokong perjanjian utama itu atau sebaliknya. Sekiranya memang wujud perjanjian lisan di antara pihak-pihak, maka pembayaran tersebut menjadi satu dorongan bagi mendapatkan tenansi bagi keseluruhan bangunan dan menutup ruang udara, sekaligus membolehkan penyewa mendapat ruang yang lebih besar yang boleh disewakan dengan sewa yang lebih tinggi. Penyewa berjaya mendapat bahagian pertama perjanjian lisan oleh kerana keseluruhan bangunan telah disewakan kepada beliau. Bagaimanapun, sementara ianya betul bahawa tuantanah telah melanggar bahagian kedua perjanjian lisan dengan tidak menutup ruang udara, beliau tidak boleh dipersalahkan. Ini kerana beliau gagal mendapatkan kelulusan pihak berkuasa relevan untuk berbuat demikian. Selain itu, walaupun dengan kegagalan tersebut, beliau masih cuba mengubahsuai harta demis setelah diminta oleh penyewa. Cuma, usahanya terhenti setelah dibantah oleh penyewa-penyewa kecil. Dalam keadaan sedemikian, tuantanah tidak boleh dipersalahkan dan beliau tidak boleh dikata sebagai telah melanggar apa-apa terma perjanjian lisan.

**(2)** Sesuatu pihak yang meyimpan apa-apa instrumen, dokumen atau suratikatan yang memanfaatkan dirinya wajib menyimpankannya dalam bentuk asalnya, dan sebarang perubahan material yang dibuat pada instrumen tersebut akan mencatatkannya, jika dibuat tanpa persetujuan pihak yang lain. Perubahan sebelah pihak yang dilakukan pada D9 memadai untuk tuantanah menganggapnya sebagai tidak mengikati beliau. Ini ditambah dengan kenyataan-kenyataan bercanggah yang dibuat oleh penyewa tentang apa sebenarnya tujuan bayaran RM38,000 itu. Penyewa bergantung kepada D9 bagi menyokong tuntutan balasnya, iaitu instrumen sama yang beliau, tanpa segan silu, mengakui telah menokok tambah perkataan-perkataan padanya tanpa pengetahuan dan kebenaran tuantanah, sekaligus terbukti mengandungi maklumat salah. Atas alasan-alasan ini, tiada sebab untuk mengganggui dapatan hakim bicara bahawa D9 telah dipalsu oleh penyewa dan kerana itu tidak boleh diambil sebagai asas bagi tuntutan balasnya.

**Case(s) referred to:**
*Tan Swee Hoe & Co Ltd v. Ali Hussain Bros [1980] 2 MLJ 16* ***(refd)***

**Legislation referred to:**
Evidence Act 1950, ss. 91, 92

*[Appeal from High Court, Shah Alam; Civil Suit No: 22-346-92]*

*For the appellant - Cyrus Das (P Mithran with him); M/s Dass Jainab & Assoc*
*For the respondent - B Thangaraj; M/s Thangaraj & Assoc*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Siti Norma Yaakob JCA:**

**[1]** This appeal concerns a tenancy dispute and in substance the cause of action is founded on the following facts.

**[2]** The respondent is the owner of a three storey shop house with a penthouse known as No. 15, Jalan 14/20 Petaling Jaya, Selangor ("the demised premises"), which he had let out to the

A appellant. For the purpose of this judgment, I shall refer to the appellant and the respondent as the tenant and the landlord respectively.

**[3]** The parties' relationship as landlord and tenant was initially B evidenced by a memorandum of understanding, if I may call it that, dated 26 December 1984, wherein the landlord acknowledged:

(1) the receipt of RM6,000 from the tenant, being the deposit for one month rental of the ground and first floors of the demised C premises.

(2) that a formal tenancy agreement for a period of two years would be executed between them to take effect from 1 March 1985.

D (3) that the tenant had the option to renew the tenancy upon expiry, for five-year terms every five years with a new rental to be adjusted at current market price.

(4) that maintenance of the structural walls, electrical wiring and water connection was to be his sole responsibility. E

(5) that the second and third floors of the demised premises would not be rented for any medical or dental practice.

(6) that the air-well of the demised premises between the first and F second floors would be closed by 1 March 1985 and this would be his sole responsibility.

(7) that in the event of a sale of the demised premises, the tenant would be given the first option to purchase it at market value.

G **[4]** This memorandum of understanding was superseded by a formal tenancy agreement dated 25 February 1985, ("the first agreement") executed by the parties. Clause 1 sets out the period of the tenancy to be two calendar years beginning from 1 March 1985, at the monthly rental of RM5,500 payable by the 30th day H of each month. Other clauses include at clause 4(b) the option to renew the tenancy every five years upon expiry of the two years with the rental adjusted to current market value, the first option to purchase at cl. 4(c) and the landlord's covenant to cover up the existing air-well and matters related to it at cls. 3(e), (f) and I (g).

**[5]** At the time of the first agreement, the tenant also made an unrecorded payment of RM48,000 to the landlord this being the first of two such payments, the consequences of which became a bone of contention between the parties and which I shall deal with later in this judgment.

**[6]** The tenant, a dentist by training, occupied the first floor of the demised premises which he had turned into a dental clinic and surgery and sub-letted the other floors and the penthouse to a number of sub-tenants.

**[7]** Relationship between the parties soured soon after the tenant moved into the demised premises. Throughout 1985 there was the dispute over the failure of the landlord to cover the air-well and to effect other renovations to the demised premises. There was evidence to show that the local authorities did not approve the landlord's plans to cover the air-well. Despite this and due to the tenant's insistence, the landlord carried on with the air-well renovation but he had to stop when the sub-tenants complained that the construction works disturbed their quiet enjoyment of the demised premises and affected their businesses. Because renovations could not be done, the rental was orally agreed to be reduced from RM5,500 to RM4,500 per month right from the start of the tenancy. Even with this concession, the tenant withheld payment of rentals for 1986 and this led to the landlord filing distress proceedings against him for arrears of rental. To settle the matter, the parties negotiated to end all their differences and this include negotiating for an extension of the tenancy from two to three years but when the landlord demanded that the rental for the third year be fixed at RM7,500 per month, the tenant was not agreeable and negotiations broke down because of this.

**[8]** By 18 December 1986, the parties appeared to have sorted out all their differences and on that date, they executed a second tenancy agreement ("the second agreement") to replace the first agreement which had only two months left before the tenancy expired.

**[9]** Clause 5 of the second agreement identifies the status of that agreement to be as follows:

A This agreement supersedes the agreement signed between the Landlord and the Tenant dated 25th February, 1985 or whatever document in relation to the leasing of the demised Premises.

**[10]** In substance the second agreement contained almost identical terms as those provided in the first agreement for example cl. 1(a) settled for a two year tenancy to run from 1 March 1985, until 28 February 1987, at a monthly rental of RM4,500. The two options remained intact at cls. 4(b) and (c) although the period of the tenancy upon renewal is reduced to three years. Likewise the landlord's covenant to maintain the structural walls, electrical wiring, water connection at cl. 3(d), together with the covenant to repaint the premises at the end of every lease. There is however no mention of the landlord's covenant to cover the air-well as provisions similar to cls. 3(e), (f) and (g) in the first agreement do not appear in the second agreement.

**[11]** Upon the execution of the second agreement, on 18 December 1986, the tenant paid up the one year's arrears of rental for the period 1 January 1986, to 31 December 1986. The arrears amounting to RM54,000 were tendered on 20 December 1986, and this is acknowledged by the landlord in a receipt bearing the same date. Three days later on 23 December 1986, the tenant paid another sum of RM9,000 to the landlord, this being advance payment of two months rental for January and February 1987. This payment too, is not disputed. On the next day, 24 December 1986, the tenant made another unrecorded payment of RM38,000 this being the second of such payments, the first being the RM48,000 paid earlier in February 1985. So in December 1986, the tenant paid a total sum of RM101,000 to the landlord. This is not disputed.

**[12]** On 19 February, 1987, just ten days before the tenancy was to expire, the landlord submitted plans for covering the air-well and other renovations to be done at the demised premises to the tenant for the latter's approval. It would appear that despite the second agreement being silent on this, the landlord was still prepared to be bound to his covenant to cover the air-well. The tenant accordingly gave his approval.

**[13]** Come 2 March 1987, and upon expiry of the second agreement, the landlord through his solicitors, Messrs. S.T. Low & Co. issued the tenant with a notice to quit giving him one month from the date of the notice to deliver vacant possession. Responding to the notice, the tenant by his letter dated 5 March 1987, contended that by accepting the RM38,000 unrecorded payment on 24 December 1986, there was a tacit oral arrangement between them that the tenancy was to continue for another three years until 28 February 1990. The landlord was also reminded of his failure to cover the air-well and to effect the other agreed renovations since December 1984, resulting in financial loss to the tenant as he was not able to sub-let the first and second floors of the demised premises. In a subsequent letter dated 10 March 1987, pertaining to the same notice, the tenant then gave notice to the landlord to start the proposed renovations immediately failing which he would undertake to do them and bill the landlord accordingly.

**[14]** Through his letter dated 12 March 1987, the landlord denied there had been any renewal of the tenancy after its expiry on 28 February 1987, and that eviction proceedings would follow should the tenant persist in holding over as a trespasser after the expiry of the notice to quit dated 2 March 1987.

**[15]** The tenant disregarded the notice to quit and continued staying on the demised premises as he had taken the stand that the tenancy had been renewed to expire on 28 February 1990, upon the payment and acceptance of the RM38,000. He also withheld paying any rental since March 1987. This led to the landlord filing proceedings leading to this appeal seeking principally vacant possession of the demised premises and mense profits. The writ and statement of claim was filed on 18 July 1987.

**[16]** In his amended statement of defence and counterclaim dated 2 October 1987, the tenant avers again to the payment of RM38,000 as advance rentals for a new tenancy for a fixed term of three years effective from 1 March 1987 to 28 February 1990, together with an option to purchase the demised premises at the agreed price of RM500,000. As this payment and option to purchase are acknowledged by a receipt dated 23 December, 1986, the tenant seeks to enforce the receipt by counterclaiming for:

(1) a declaration that the receipt constitutes a binding agreement.

(2) specific performance of such an agreement.

(3) damages following the landlord's breach of his covenant to effect the necessary renovations to the demised premises.

**[17]** Between October 1987 to April 1990, both parties assumed a stand off position each waiting for the outcome of their respective claims in the pending suit. Then on 23 April 1990, whilst the suit was still pending, the landlord issued a second notice to quit, the contents of which were identical to the first notice, issued three years earlier. The tenant was also threatened with legal proceedings, even though such proceedings had already commenced in 1987.

**[18]** The parties then entered into discussions for a possible sale of the demised premises sometime in April/May 1990. At the same time in response to the second notice to quit, the tenant, by his solicitor's letter dated 21 May 1990, reminded the landlord of his counterclaim for specific performance of an option to purchase the demised premises at RM500,000 which he had already exercised on 7 February 1990. As a sign of good faith the tenant also tendered a cheque for RM50,000, representing 10% of the purchase price of the demised premises, pending the execution of the sale and purchase agreement, a draft of which had already been forwarded to the landlord on 7 February 1990, for approval. The tenant again reiterated that since he had already made a lump sum payment of RM38,000 by way of rental for three years, the second notice to quit was bad in law.

**[19]** In his reply dated 1 June 1990, the landlord refused for the first time to accept the tenant's exercise of the option to purchase or any proposition for settlement of their dispute. That was the situation when the trial proceeded in the court below and after a 21 day hearing, the learned judge made the following orders.

(1) Dismissed the tenant's counterclaim with costs.

(2) Allowed the landlord's claim and ordered the tenant to deliver vacant possession of the demised premises to the landlord forthwith. Vacant possession is however confined to the first floor and the penthouse as the landlord had since regained possession of the ground and second floors.

(3) The tenant to pay RM219,824 to the landlord as damages by way of rental for March 1987, and mense profits thereafter with interest at 8% per annum from the date of judgment to the date of realization.

(4) By consent Messrs. Abdul Aziz, Ong & Co. pay to the landlord the accumulated sum representing 32 months rental for the ground floor with all interest accrued, held by them as stakeholders.

The circumstances leading to this order were that after 1 March 1987, a dispute arose as to who should collect the rentals of the ground floor which had been sub-letted. The matter was resolved when both the tenant and the landlord agreed to let the sub-tenant deposit the rentals with her solicitors as stakeholders. Since the tenant has been held to be a trespasser after 1 March 1987, the rentals with interest accumulated held by the stakeholders were ordered to be paid out to the landlord.

**[20]** In his lengthy judgment, the trial judge made a number of findings, mostly findings of fact and Dato Dr. Cyrus Das, learned counsel for the tenant was quick to assure us that he was not appealing to have such findings reversed. On the contrary, he accepted them to have been properly determined based on the evidence, both oral and documentary. However he did question one finding that additions made on three receipts were made unilaterally without the consent or knowledge of the landlord. This, Dato Dr. Cyrus Das maintained, runs contrary to the contemporaneous events and the probabilities of the case. More of this later.

**[21]** From a reading of the judgment itself, we cannot help but conclude that the trial judge was hard put by the very manner the evidence was unfolding before him as he was doubtful whether both parties had been honest and above board in their dealings with each other and frank and truthful when it came to giving their testimony in court. If only there was some degree of candidness on both sides, the task of the trial judge would have been that much easier.

**[22]** Be that as it may, from the strenuous arguments put forward before us by both Dato Dr. Cyrus Das, learned counsel for the tenant and Mr. Thangaraj, learned counsel for the landlord, we frame the following two broad issues for our determination.

1. What is the status of the two unrecorded payments of RM48,000 and RM38,000 and whether in law they create any legal obligations on the part of the tenderer, the tenant and the recipient, the landlord.

2. Whether the addition of words in the receipt dated 23 December 1986, prepared by the tenant to record the payment of RM38,000 amount to forgery in law as to disentitle the tenant to rely on the receipt to support his contention that the tenancy had continued until 28 February 1990, and that he had the option to purchase the demised premises at the agreed price of RM500,000.

**[23]** It is the tenant's case that he made the first unrecorded payment of RM48,000 to the landlord as the commission or inducement to obtain the tenancy of the whole building and the closing of the air-well, so that he, the tenant would acquire a bigger space with which he could sub-let for better rents.

**[24]** We have no reason to doubt the purpose of this payment as the landlord never questioned such a purpose in the first place as he had taken the stand that he never received such a payment at all, a stand that was disbelieved by the trial judge and which we endorse to have been correctly determined. This is so as the tenant had brought to court his relevant bank statement dated 28 February 1985 (D25) showing the sum had been paid out by way of a Bank Bumiputra Malaysia Berhad's cash cheque No. 00110580 (D16A) and the tenant had also by letter dated 18 October 1985 (D26) requested his bankers to preserve the cheque. In his written judgment, the learned judge had to say about the payment of RM48,000.

> In the result I have to hold that Lee had lied when he said first in Megat's letter of 8th November, 1985 (Ex P.32) that he had not received this RM48,000/- and again on oath in his evidence in this Court. In this context it matters not if the cash was actually handed to Lee's father because such a receipt could only been on Lee's behalf.

**[25]** As the learned judge had made a correct finding of fact on the evidence before him, we see no reason to disturb that finding.

**[26]** As for the second unrecorded payment of RM38,000, the landlord has admitted that he had received that sum from the tenant both in his reply dated 2 October 1987, and in his oral testimony. There is also the undisputed evidence that the tenant originally issued the landlord with a crossed Bank Bumiputra Malaysia Berhad (BBMB) cheque No. 365512 dated 20 December 1986, for that amount (D14). The landlord did not bank in the cheque but instead saw the tenant on 24 December 1986, and exchanged the crossed cheque with a cash BBMB cheque No. 365515 (D24A) as he needed the funds urgently.

**[27]** It is the tenant's case that with the payment of RM38,000 there was a tacit oral arrangement reached between him and the landlord that the tenancy was allowed to run for a further period of three years from 1 March 1987 to 28 February 1990, and during that period, he was also given the option to purchase the demised premises at the agreed price of RM500,000. That oral arrangement has since been documented in the receipt dated 23 December 1986, (D9) wherein particulars of the payment as well as its purpose are clearly set out and defined. The tenant goes further to say that he had already exercised the option to purchase on 7 February 1990, and as a token of his goodwill had tendered 10% of the purchase price to the landlord.

**[28]** In rebuttal, the landlord explained that the payment was to tide over the costs of covering the air-well and other renovations to be done to the demised premises. He had never intended to renew the tenancy beyond 28 February 1987, and hence the notice to quit issued on 2 March 1987. Likewise he never intended to sell the demised premises and had returned the 10% deposit made by the tenant as he had never granted the tenant the option to purchase. As for D9, particulars of the payment of RM38,000 and what it stood for, were added well after the receipt was issued without his consent or knowledge. Since such entries were done unilaterally without his authority, the document is a forgery and the tenant cannot rely on it to support his counterclaim.

**[29]** From the oral and documentary evidence, it is clear that as at 24 December 1986, the landlord had received two unrecorded sums of money totaling RM86,000 over and above the sums due under the first and second agreement.

**[30]** What is the legal effect of these payments? The learned trial judge reached the following conclusion as regards the payment of RM48,000.

> The evidence here shows that the true position was that both Lee and Singam had reached a collateral agreement that this RM48,000 was an undercounter payment as a consideration for the first Tenancy Agreement. On the 24th December 1984, Dr. Singam got a receipt for RM6,000 deposit (P.33). On 25th March, 1985, he got a receipt RM5,000 (P.36). If RM48,000 was above-board it is inconceivable that Dr. Singam would not have insisted on 25th February, 1985, that he be given a receipt for the RM48,000. The matter could have been referred to in the Memorandum of 26th December, 1984 or even the first Tenancy Agreement dated the 25th February, 1985, which Dr. Singam had not yet signed. It was not. In Court Dr. Singam admitted it was an off the record payment.

**[31]** Although the learned trial judge found that the RM48,000 was an undercounter payment, he did not proceed further to consider the legal implications of the tenant's conduct in tendering the money and the respondent's conduct in accepting it.

**[32]** There is a growing body of authority to say that such a payment allows the existence of a collateral agreement to exist side by side with the main agreement that it supplements or contradicts. In this appeal, the payment does not appear in the first or second agreement. A somewhat similar situation was found in *Tan Swee Hoe & Co. Ltd. v. Ali Hussain Bros* [1980] 2 MLJ 16, a case also involving a tenancy dispute and which is generally considered as the leading authority on the matter. In that case the appellants had orally agreed to allow the respondents to occupy the premises for as long as they wished upon payment of RM14,000 as tea money. Two written tenancy agreements were later executed by the parties but neither referred to the appellant's promise. A dispute arose between the parties and the appellants sued for vacant possession. In their defence the respondents claimed that under the oral agreement, they were entitled to stay as long as they wished so long as they paid the rent regularly. On appeal, it was argued for the appellants that evidence of the oral promise could not be given in view of ss. 91 and 92 of the

Evidence Act 1950. That argument was overruled by Raja Azlan Shah, CJ (as he then was) who held that the only way of overcoming ss. 91 and 92 is by invoking the doctrine of collateral contract or collateral warranty as the "device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement."

**[33]** If indeed there existed an oral agreement between the parties what in fact were the precise terms of that agreement? The answer lies in the purpose of the payment, namely the inducement to obtain the tenancy of the whole building and the closing up of the air-well so that the tenant would acquire a bigger space with which he could sub-let for better rents.

**[34]** The tenant succeeded in securing the first term of the oral agreement as the whole building was leased to him. Whilst it is true that the landlord had breached the second term of the oral agreement in that he did not cover the air-well, we consider that he cannot be faulted for the following undisputed reasons.

(1) He was not able to get the approval of the relevant authorities to effect such renovations.

(2) Despite that failure, he did, at the insistence of the tenant, attempt to renovate the demised premises, but following the complaints of the sub-tenants he was forced to stop such works.

**[35]** Under these circumstances we consider that no blame should be attached to the landlord and for this very reason nothing turns on the oral agreement as the landlord cannot be said to have breached any of the terms of such an agreement. In any event the tenant is not relying on the payment of RM48,000 to support his counterclaim but on the second payment of RM38,000 which is evidenced by D9.

**[36]** D9 was prepared by the tenant wherein the landlord acknowledged receipt of a sum of RM9,000 being advance rentals for January and February 1987, at the rate of RM4,500 per month, paid to him by the tenant. That was as far as what D9 purported to say when the landlord signed on it. However the tenant, without the consent and knowledge of the landlord added

the fact of the payment of RM38,000 into D9 as well as other details at the convenient spaces in D9 and for this very reason the landlord challenged the legality of D9, to be a forgery. To appreciate this objection I reproduce D9 showing the original statements at the time the landlord signed it and the unilateral entries made by the tenant.

D9

**Owner/Seller**
Mr. Lee Siew Leong
3, Lorong Timor
Petaling Jaya 23.12.86

**Tenant/Buyer**
Dr. S.T. Singam
15, Jalan 14/20
46100 Petaling Jaya

**Re: Premises at 15, Jalan 14/20, 46100 Petaling Jaya**

Due to my breach of our lease dated 25.2.85 and your advance payment of rental till 28.2.90 I hereby give you this option to buy this premises at Five Hundred Thousand Ringgit. I Mr. Lee Siew Leong I/C No.2654131 (Landlord) also confirm receipt of rentals for the months of January 1987 and February 1987 via cheque No.BBMB 365517 (Section 14) dated 23.12.86 amounting to $9,000/- (Nine Thousand Ringgit) at $4,500/- Dollars per month (Four Thousand Five Hundred Ringgit per month). This confirms full rental paid up to 28.2.90 and the above option to buy over the premises is also extended till 28th of Feb. Nineteen Hundred and Ninety.

... ...
Tenant's Signature Landlord's Signature

**[37]** The highlighted words represent the entries made by the tenant after D9 was signed by the landlord on 23 December 1986.

**[38]** The learned judge described the tenant's conduct in the following manner.

"But he" (the tenant) "says the additions were necessary because after the words were typed (with which Lee agrees) the additional words were typed because Lee always changed his mind. In the case of D9 he said that three times the document was typed and

taken out, put in and added to. This kind of evidence is especially bizarre when one considers that what these words were meant to reinforce at each stage was the same thing i.e. three years rental and a 3 year option for RM38,000/-.

**[39]** How does the law treat such a document?

**[40]** When a document or an instrument, on its production, appears to have been altered, it is the general rule that the party offering it in evidence must explain the alteration. Any material alteration in a written document or instrument, whether made by a party or a stranger is fatal to its validity, provided it was made after the document was executed and without the privity of the party to be effected by it and with the additional proviso that the alteration was made while the document was in the possession or in the control or the supervision of the party seeking to enforce it. As such the law on the material alteration of a document or deed is well settled in that a party who has the custody of an instrument or document made for his benefit is bound to preserve it in its original state and any material alteration of it will vitiate the instrument , if it was done without the consent of the other party.

**[41]** As that had actually taken place in this case, the unilateral alteration in itself is sufficient to enable the landlord to treat D9 as being non-binding on him.

**[42]** Added to this is the fact that the tenant made contradictory statements as to what the RM38,000 stood for. In his pleadings, he had maintained that it represented three years advanced rentals which works out to be RM1,055 rental per month. This monthly rental for the extended three year tenancy is far less than the RM4,500 monthly rental which the landlord had received during the currency of the first two year tenancy. It seems highly inconceivable that the landlord would settle for a monthly tenancy which is so much lesser than what he got from the original two year tenancy. This is so when the tenancy agreement had stipulated that the rentals for any extended period will be based on current market value.

**[43]** The tenant must have realized this for in his testimony he changed his story by stating that the RM38,000 represent six months advance rental for the renewed period.

**[44]** In any event, the trial judge did not believe him and for good reasons and concluded that D9 had been forged by the tenant.

**[45]** Blackstone has defined forgery as "the fraudulent making or alteration of a writing to the prejudice of another man's rights." Forgery has also been explained in the following words:

> the false making or materially altering with intend to defraud of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of legal liability.

**[46]** The existence of an intention to a fraud is essential to the crime of forgery although it is immaterial that no one was in fact deceived. A general intend to commit fraud is all that is required and it is not necessary to show that the offender intended to defraud any particular person.

**[47]** Forgery, in *Tomlin's Law Dictionary* has been explained as "a false making of any written instrument for the purpose of fraud or *deceit*, including every alteration of or addition to the true instrument."

**[48]** The tenant relies on D9 to support his counterclaim, the very same instrument on which he had unashamedly admitted he had added words without the knowledge and consent of the landlord and which have been proven to contain false information. For that very reason we see no reason to interfere with the trial judge's finding that D9 had been forged by the tenant and therefore cannot be relied upon as the foundation of his counterclaim.

**[49]** Finally we come to the objection of the admission of the two notices to quit issued by the landlord's solicitors. Paragraph 4 of the statement of claim pleads the first notice to quit dated 2 March 1987, as the foundation of the landlord's claim for vacant possession and it is this notice to quit that is relevant for the purposes of the remedies sought for by the tenant.

**[50]** Although both parties have been represented by solicitors from the very inception of the proceedings, there is a lot to be desired insofar as the pleadings go and it is no wonder that the hearings dragged for 21 days. As parties are bound by their pleadings they cannot be heard to object when proceedings are

allowed to drag by the admission of evidence for which no objection had been taken by any of the parties at the hearing of the suit.

**[51]** As there is no objection to the award of damages made by the court below and that the trial judge's finding on liability is hereby confirmed, this appeal must fail, and accordingly it is dismissed with costs and the deposit is to be paid out to the landlord/respondent to account of his taxed costs.